72-1199

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1199

BOBBY JERALD CULPEPPER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a Writ of Certiorari issue to review the final order of the Fourth Circuit Court of Appeals entered herein on January 30, 1973, denying petitioner's Petition For Rehearing on the affirmation of his conviction for the crime of conspiracy to commit bank burglary under Title 18, Section 2113 (a) of the United States Code.

JURISDICTIONAL STATEMENT

This is a Petition for Writ of Certiorari from the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 8, 1972 affirming per curiam the conviction of appellant for the crime

of conspiracy to commit bank burglary. Rehearing was denied on January 30, 1973.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit has not as yet been reported, but reads as follows:

> "Per Curiam:
>
> Upon consideration of the briefs and oral argument, we find no reversible error in the trial resulting in a conviction of conspiracy to commit bank robbery.
>
> Affirmed."

No opinion exists with regard to the conviction of the Petitioner in the United States District Court for the Western District of North Carolina.

JURISDICTION

Petitioner was convicted for violation of Title 18, Section 2113 (a) United States Code, in the United States District Court for the Western District of North Carolina during the May, 1972 Term of that said Court. He perfected a timely appeal of his conviction to the Court of Appeals for the Fourth Circuit, which was affirmed per curiam in a memorandum opinion on January 8, 1973. A Petition For Rehearing was filed by the Petitioners and on January 30, 1973 this said Petition was denied. A Motion for Stay of Mandate was filed in the Court of Appeals. Jurisdiction of this Court to review

the judgment of the Fourth Circuit Court of Appeals is invoked pursuant to 18 USC, Section 1254 (1).

STATEMENT

The Petitioner, Bobby Jerald Culpepper was indicted for violation of 28 USC, Section 2113 (a), that being conspiracy to commit bank burglary. He was tried in the United States District Court for the Western District of North Carolina, and found guilty before a jury.

On appeal to the United States Court of Appeals for the Fourth Circuit, your Petitioner raised six issues:

1. The Trial Judge committed plain error in his charge to the jury.

2. The Court erred in admitting testimony of prior bad acts, probation and jailing of the Appellant.

3. That the comment on the evidence made by the Court in the jury's presence to the effect that a conspiracy had been established, constitutes reversible error.

4. The Court erred in admitting the statement of Franklin Andrew Roth for the purpose of corroborating the testimony of Franklin Andrew Roth.

5. The Court erred in not giving limiting instructions in his final charge concerning the admissibility of the statement of Roth.

6. Appellant did not receive a fair and impartial trial as guaranteed by the fifth and sixth amendments to the United States Constitution, because of the undue participation of the Trial Court.

The Circuit Court of Appeals for the Fourth District wrote only a memorandum opinion affirming the Petitioner's conviction, and gave no grounds for such averments. The Petitioner herein is wholly innocent of the crime of which he has been charged and convicted. In the Trial Court he received an unfair trial which was not fair and impartial as guaranteed by the fifth and sixth amendments of the United States Constitution. On appeal, the intermediate appellate court did not in fact follow the law as layed down by this Honorable Court and further failed to follow the body of laws which that same court had in fact promulgated. The Petitioner now seeks redress of the grievances and unfairness imposed upon him by these lower courts.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

I.

The ruling of the United States Court of Appeals for the Fourth Circuit, by which the Petitioner was convicted of conspiracy to commit bank burglary is contrary to the fifth and sixth amendments of the United States Constitution and is in fact evidence of a division among the circuits, insofar as the admission of testimony of prior bad acts, probation and jailing of an appellant is concerned.

On appeal in the case at bar the appellant raised the issue that the government had in the trial of his

case, introduced evidence, some of which was over the objection of counsel, concerning his leaving Alaska with bad debts, a bad conduct discharge from the Army in 1964, a trial of the Petitioner with regard to an alleged Dire Act violation, parole violations, making and uttering worthless checks with intent to defraud, and time in jail. With the exception of the time in jail in Charlotte, North Carolina, at which the Petitioner allegedly met and conspired with one, Jack Harwell, it is respectfully submitted to this Honorable Court that all of the remainder of this evidence was admitted on the part of the government, not for purposes of proving the case at bar, but rather for the sole purpose of inflaming the jury and labeling the Defendant a "jailhound".

On page 166 of the Trial Court Record of this case is found the following dialogue:

"Q. With a bad conduct discharge?
A: With a bad conduct discharge, yes, sir, sure did. On November 11 or 12 of 1964 I entered Topeka, Kansas court on a trial of the Dire Act, a branch of the Dire Act, and was told by the court appointed attorney to plead guilty and get a twelve months suspended sentence, which I did, and wound up with two years probation which is the probation I'm still under today.
Q: Which was to begin at the expiration of your prior time for making and uttering worthless checks with intent to defraud, wasn't it?

A: No, sir, I don't recall that one.
Q: And since that time you fled when you had charges against you, didn't you?"

Further quoting from the record at page 162 thereof:

"Q: You left Alaska with some bad debts, didn't you?

MR. GOODMAN: I'm going to object to that.

COURT: Overruled.
Q: You left Alaska owing some bad debts, did you not?
A: I don't believe that ... you'll have to refresh my memory and tell me what they were.
Q: You were wanted for worthless checks when you left Alaska, weren't you?

MR. GOODMAN: Objection.

COURT: Overruled. He said he would have to refresh his recollection and he's asking him specifically if it wasn't worthless checks. Tell him what you think the truth is.

A I don't remember, sir. I'd have to ..."

Also, on direct examination of the witness, Franklin Andrew Roth, counsel for the government asked the

following questions, and received the following answers on page 31 of the Trial Court Record:

"Q: Did you ever hear him say when he met Mr. Harwell?
A: He met him in the County jail.
Q: When?
A: When he was arrested for jumping parole, I believe."

It is respectfully submitted by this writer that evidence of a bad conduct discharge years before the alleged conspiracy involved in this case, that evidence of bad debts and worthless checks left due and owing in Alaska, months before the alleged conspiracy in this case, and that evidence about his meeting Mr. Harwell in the County Jail, where he was detained for having jumped parole are all evidentiary matters, not introduced for the purposes of proving motive, lack of honesty or truthfulness, and are presented solely for the purpose of inflaming and prejudicing the jury against Bobby Jerald Culpepper. For example, what logical correlation could be drawn between the Petitioners having debts in Alaska and having written bad checks in Alaska to the charges against him in the State of North Carolina of having conspired to burglarize a bank there? Counsel for the United States Government has submitted that the evidence of the debts and bad checks was brought out to prove motive. Is evidence that a man is indebted to other people or has written bad checks any reason to assume that he is apt to conspire to burglarize a bank? This writer thinks not, and further suggests to this Honorable

Court that reasoning of the type urged by the government on appeal in the case at bar has the tendency of suggesting that any man who owes money is thereby motivated to conspire to commit bank burglary.

As stated on page 8 of the Brief and Appendix For Appellee in the case at bar the fourth circuit has been rather liberal in application of the rule preventing the introduction into evidence of prior bad acts of a defendant. The rule as quoted from the case of *Simon* vs. *U. S.*, 123 F.2d, 80 (4th Cir., 1941) is as follows:

> "The rule is that for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness; . . ."

The case of *Odom vs. United States*, 377 F. 2d 853, (5th Cir., 1967) stated the rule in the 5th Circuit as it applied to the matter in question as follows:

> "Conner v. United States, 5 Cir. 1963, 322 F.2d 647, enunciates the general principle that an erroneous admission of evidence is cured by instructing the jury to disregard it where substantial rights of the defendant are not affected — that is, where guilt is clear and error, if any, is harmless. However, where, as here, the testimony is highly prejudicial and otherwise irrelevant to the case, not declaring a mistrial constitutes plain error under Fed.R.Crim.P. 52(b) and is not cured by a court admonition to disregard."

In the Odom case, supra evidence that the defendant had been seen in and out of jail for approximately a year and one-half was introduced. Prompt objection was made by defense counsel to strike the testimony and the court in sustaining the motion admonished to the jury not to consider that evidence in arriving at their verdict. No such admonishment was made in the case at bar; however, such erroneous testimony was introduced, with some of it being over the objection of the defense counsel.

In the case of *United States vs Smith*, 403 F.2d 74, (6 Cir. 1968) a witness for the government while under direct examination stated in evidence that the defendant had just got out of the penitentiary. In reversing the conviction the 6th Circuit Court of Appeals held:

> "While the statement of the witness that the defendant had recently been released from the penitentiary would not in itself supply guilty knowledge, nor could an inference of guilty knowledge be drawn from it, it would tend to create prejudice in the minds of the jurors."

The 10th Circuit Court of Appeals held in the case of *Maestas vs United States*, 341 F.2d 493 (10 Cir., 1965) that:

> "Evidence or allegations of prior crimes are inadmissible at a criminal trial, either to establish guilt or to show a propensity on the part of the defendant to commit the crime with which he is charged. (citations omitted)"

The Supreme Court of the United States in the case of *Michelson vs. United States,* 335 US 469, 69 S.Ct. 213, (1948) said:

> "Courts that follow the commonlaw tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. Such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The above quote taken out of the Michelson case, supra, is a true statement of the law in virtually all of the circuits of the United States, with the exception of the 4th Circuit. The Michelson case, however, is not completely in point with the case at bar, as it is in fact, involved with the right of the State to raise issues of bad character once the defense has raised the issue of a defendant's good character. In the case at bar, character witnesses had not been called for the defendant thereby enabling the government to raise these prior bad acts.

Had the Petitioner herein been tried in the 5th, 6th, or 10th Circuits, it would have been likely that the issue raised in this particular cause would have constituted reversible error. However, the 4th Circuit, with its different and unjust rule, has caused the Petitioner a grave injustice for which only this court may make redress. Bobby Jerald Culpepper humbly prays that this court will in fact grant him such relief.

II.

The Circuit Court of Appeals for the 4th Circuit, in affirming the conviction of your Petitioner has in effect, held contrary to numerous holdings of this Honorable Court, and thereby denied the Petitioner herein the right to a fair trial.

This Honorable Court in the case of *Brady vs State of Maryland*, 373 US 83, 83 S.Ct. 1194, 10 L.Ed. 215, (1963) layed down one of the most beautiful thoughts of American Jurisprudence when it said:

> "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

In the charge to the jury the Trial Court on several occasions improvidently and with callous disregard for the rights of the Petitioner did misstate and in fact did invent facts pertinent to the case at bar, which were never alleged or proven in the testimony and evidence presented in the case. All of this evidence charged to the jury by the court was to the detriment of the accused.

On page 184 of the Trial Court Record the Court stated:

> "... That he came to Charlotte from Alabama where previously he had been charged with some offense and been placed on probation; that he came to Charlotte from Alabama by fleeing the jurisdiction where he was serving probation or serving under a term of probation...."

There was evidence admitted as to the Defendant being on probation at the time he came to North Carolina; however, the fact that he was on probation should have no effect on the guilt or innocence of the Defendant for the purposes for which he was tried and therefore had no place in the Court's charge to the jury.

The Court also said in its charge:

"... and that, of course, obviously he, like all other people doing business, needed money and that he was able to, the government saying and contending, by one devious way or another to impress himself favorably upon the gentleman who was operating that relatively small bank and borrow some sums of money; ..."

No evidence whatsoever was introduced in the trial of this case concerning the Petitioner's dishonesty with regard to his dealings with the Bank of Wingate. On another occasion in the charge the Trial Court said:

"... that while he (meaning the Appellant) was in jail he came in contact with and learned by being placed in a cell of one Walter Jack Harwell, the government saying and contending that Harwell never having been yet found, that he was a con man to the extent he was a check artist or one who knew how to drill holes in banks and how to rob banks and that while the two sat there during the days and nights that they came up with the idea ..."

Yet no competent evidence was ever introduced in the trial of the case to the effect that Jack Harwell, would be alleged co-conspirator, was a check artist or a person who knew about robbing banks.

The Court further stated in the charge:

"... that the next day, (after Harwell was re-

> leased from jail) the, through some means or another, all of which the government says and contends it doesn't know, that a sufficiency of cash was gotten up, $700 or $1000, and taken to the bondsman who had already released Harwell and stood bail for him and the check was picked up; the government has offered you that check in evidence."

No such check was ever offered into evidence.

The government attempted to prove in the trial of the case at bar that the Petitioner, in the company of one Jack Harwell, attempted to burglarize the Bank of Wingate, North Carolina, during the early morning hours of November 7, 1969. In the testimony entered in the case at bar the most favorable testimony to the government, which placed the Petitioner away from his home on the night of November 6, 1969, and the early morning of November 7, 1969, was the testimony of Franklin Roth, who stated that he left home about 8:00 p.m. and returned between 10 and 11 o'clock p.m. The Court, however, in its charge to the jury stated;

> "... that he (referring to the Defendant) left his home and met with Harwell somewhere on the Union County Mecklenburg County line, or Cabarrus County line, as you will recall sometime after midnight or just before and that then Harwell went down; ..."

Furthermore, without evidentiary basis the Court stated in its charge:

> "... then Harwell fled immediately and shortly after that, within a matter of a couple of weeks when it began to appear to the defendant that he likewise may be charged that the investigation was being undergone by the FBI, that he left Charlotte and went to Key West, Florida, and ..."

All of these misstatements of fact, most of which lacked evidentiary basis, must certainly have had some influence upon the jury in the trial of the case at bar. It is not the contention of the Petitioner herein that the Trial Judge has no right to comment on facts in his charge to the jury; however, it is our contention that he may not either distort the facts or add to them. It is further the Petitioner's contention that should he either distort or add to the facts in his comments to the jury and such distortion is highly prejudicial to the accused then it should constitute plain error and warrant a reversal. In the case of *Quercia vs. United States*, 289 U.S. 466 53 S.Ct. 698 (1933) in referring to the Trial Judges' power to comment on the facts this Honorable Court said:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not as-

sume the role of a witness. He may analyze and dissect the evidence but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'"

In *Chapman vs California*, 386 U.S. 18, 87 S. Ct. 824 (1967) at page 827 this Honorable Court said with regard to Rule 52 (b) of the Fed. Rule Civil Proc. that "substantial rights" must be effected before the appellate court should consider errors not preserved during the trial by timely objection. The court in quoting from its opinion in *Fahy vs State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171, (1968) said:

"The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. ... it emphasizes an intention not to treat as

harmless those constitutional errors that 'affect substantial rights' of a party."

The Court went on to say:

"... constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless."

The Court further stated:

"... that before a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The Petitioner humbly submits that the statements made by the Trial Judge in his charge to the jury were most prejudicial to his case and were so numerous and inflamatory that from the foregoing case law as cited and quoted should be controlling in the case at bar. Certainly it is also true that these actions on the part of the Trial Judge constitutes sufficient prejudice to bring them within the purview of rule 52(b) of the Fed. Rule of Civil Proc.

It is further submitted to this Honorable Court that the Trial Court, on the issue previously discussed, of the admissibility of prior bad acts held contrary to

the case of *Boyd vs United States*, 142 U.S., 450, 12 S.Ct., 292, (1892).

It is submitted by this writer that no greater right or guarantee may be given a free people than the right to a fair trial. This right goes to the very basis of our government and laws. I sincerely state to this Honorable Court that the Petitioner herein has received an unfair trial from which the appeal to the Circuit Court of Appeals for the Fourth Circuit fell upon deaf ears. When a trial is unfair and an innocent man is thereby convicted and sentenced to the penitentiary all members of the society which allows such action to happen lose a degree of moral dignity. Bobby Jerald Culpepper is such an innocent man. Please allow his Petition to be heard in order that this wrong might be rectified.

CONCLUSION

A free people must be enabled to rely upon the laws of their government. To preserve and maintain these laws, a judiciary system must be so established as to insure these rights and uphold these laws. This highest judicial tribunal in the world, in order to preserve the liberties of this great nation, have been given the trust to protect its citizens. From a careful reading of what is said in this petition and from the law as previously stated by this court, it is humbly urged that this court should grant this Petition For Certiorari and hand down a decision whereby the states are bound in the Fourteenth Amendment to the United States Con-

situation to insure that judicial fairness exists in the trial of all criminals, tried by the Federal judiciary.

Respectfully submitted,

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PROFESSIONAL
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2225 West Main St.
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ROY O. PARKER
ATTORNEY FOR
APPELLANT

CERTIFICATE

I, Roy O. Parker, attorney for Petitioner herein do hereby certify that I have delivered a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States, to the Honorable Keith S. Snyder, United States Attorney, Room 310, Post Office Building, Ashville, North Carolina; and the Honorable David B. Sentelle, Assistant United States Attorney, Room 247, Post Office Building, Charlotte, North Carolina, by mailing a copy of same to each of them at their above respective addresses, postage prepaid on the 26th day of February, A. D., 1973; and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of

Justice, Washington 25 D. C. on the 26th day of February, A. D., 1973.

This the ____ day of _____, A.D., 1973.

ROY O. PARKER
ATTORNEY FOR
APPELLANT
2225 West Main St.
Tupelo, Miss. 38801

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Respondent

versus No. _____

BOBBY JERALD CULPEPPER,
Petitioner

Notice is hereby given that Bobby Jerald Culpepper, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of this court denying his Petition For Rehearing and entered on the 30th day of January, A. D., 1973.

This appeal is taken pursuant to 18 U.S.C. §1254 (1).

ROY O. PARKER
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2225 West Main St.
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APPENDIX

CHARGE TO THE JURY

COURT: Members of the jury, as I have explained to some of you at least, possibly all of you — it depends on whether you were on the last jury case that was determined — in the United States Court certain formulas are laid down and certain requisites are required for the trial of one charged with a crime against the United States, all that being done by the Congess under the constitution of our country, with the idea in mind according to the facts that every individual have a fair and impartial trial; that his conviction, if such comes about, that it be under the law and under a trial that is formulated according to the principles laid down.

This is a criminal trial against an individual who is set out by name as Bobby Jerald Culpepper and charges him with a crime under the United States law more or less commonly spoken of as a conspiracy. To that charge — and I will read to you fully the bill and the law with respect to conspiracy and at that time to give you a full and complete charge — he enters a plea of not guilty upon his arraignment and following the return of a true bill by the grand jury in which he is charged with that offense and, by entering his plea of not guilty he raises an issueable or jury fact, such as you now constitute yourselves among the other twelve making up the jury list, which is incumbent upon you, in the event all twelve of your minds agree, for you to say by your verdict and from the evidence under the law what you believe the truth to be.

As one of counsel remarked in the argument, the province of the jury in a court of justice is to find the truth regardless of what effect that truth may have upon anyone connected with the controversy, the government on the one hand or the accused on the other, but impartially and justly and honestly and uprightly determine what you believe from the evidence under the law is the truth and to speak that as your verdict in this particular case.

First, among other things, when one is charged with a crime — and I'll give you these preliminary requisites to begin with and otherwise I will not of necessity come back to them — when one is charged with a crime, he is given the type and character of the crime alleged against him in the nature of a paper writing which indicates to him what he's charge with and the statute under which the crime is lodged, the number of the statute, which is specifically likewise spelled out, so that he or his lawyer or either or both can know exactly what the offense is and that offense and that only is all he could be tried for unless an additional bill might be lodged against him.

When one is arrested and charged with a crime, then he has the right to have counsel of his own choosing. Or if he's incompetent or indigent that he have someone designated to represent him, if he's lacking or incompetent in the fact that he doesn't have money or is lacking for money; or he has a right to employ one of his own choosing with his own funds. He has a right to have the case determined in a court of justice and,

following the selection of the jury, in which his counsel takes a very prominent part, as well as does the District Attorney. Then when the jury is selected, after having been sworn, it is empaneled to speak the truth about that particular issue.

All those processes that I have just recited have been undergone and have been accomplished thus far and the case is now drawing to the point where it's going to be your responsibility to determine from the evidence under the law what you believe the truth is and reflect that in the verdict, one of two verdicts you can make in this particular case in the event all twelve of your minds reach a verdict or come to a conclusion or have a general understanding, all agree, as a matter of fact.

Other factors involved is that since the government makes the charge against the accused, as it does in every case it's prosecuting for trial, the government of the United States has the burden of proof cast upon it. It has the designation of being required to go forward with the evidence and another designation is that from that evidence it must satisfy the jury from the evidence heard and under the law and beyond a reasonable doubt.

So I pause here now to explain to you what is meant by a reasonable doubt because I will undertake as best I can and as I invariably try to do, to take each step as we arrive at it. Reasonable doubt, ladies and gentlemen, is a doubt that is predicated basically upon reason, as a human mind would undertake to reason out a matter. The Fouth Circuit Court of Appeals —

I will give you that definition so you'll have some idea of what is meant by a reasonable doubt. The Fourth Circuit is the appellate court from this court in the five states embracing the Fourth Circuit, North Carolina being one of those. In a recent decision they said a reasonable doubt is this and that is probably a good, common sense definition of what is meant by a person having a reasonable doubt in a reasonable mind, such, as I am sure, you have and sure you have a reasonable mind.

A reasonable doubt, the Court said, means a doubt founded upon reason. It does not mean a fanciful doubt or a whimsical doubt or a capricious doubt for anything relating to human affairs and depending upon human testimony is obviously open to some possible, some imaginary doubt. Reasonable doubt is the kind of doubt that would make a reasonable person hesitate in the face of it to act in any manner of like importance relating to his own affairs. A reasonable doubt, members of the jury, I instruct you, exists in any case when after a careful and impartial consideration of all the evidence you, as members of the jury, do not feel convinced to a moral certainty that the individual charged is guilty of the charge lodged against him. In other words, a reasonable doubt is different from a mere shadow of a doubt or trivial doubt or fanciful doubt. It is based upon the reasonableness of a thing. It is not a doubt that might be suggested by the mental operation or ingenuity of counsel or even by your own ingenuity which might not otherwise be legitimately warranted by the testimony, or one born of a merciful inclination. It all comes back to the definition given

by the Court to a doubt that a reasonable person would have in his or her reasonable mind.

The burden of proof is upon the government, as I remarked earlier, and that is to satisfy you from the evidence and under the law and beyond a reasonable doubt. There is no burden of proof on this defendant. The constitution of the United States, as well as the laws enacted by the Congress thereunder placed the whole burden of proof upon the government and not upon the defendant.

This defendant likewise, in addition to having no burden of proof cast upon him, is presumed to be innocent. That's a presumption that the law throws into every charge that might even be made by the law, that you are presumed to be innocent and that brings into play the question of the burden then being upon the Government to satisfy the jury beyond a reasonable doubt before it could remove that presumption of innocence by returning a verdict of guilty against the accused person.

I know that the record that is made and another situation that exists as made by the law is that every individual that is charged with a crime, such as this defendant is, in addition to having no burden of proof and being presumed to be innocent, has the right to go upon the witness stand. Actually, he has the right to go upon the witness stand and testify or remain off the stand and not testify, just as he may elect or as his counsel advises him.

Now, the defendant in this case has gone upon the witness stand to testify in his own behalf. The law then injects this into the picture: says he is interested in the outcome of the verdict, being the individual against whom the judgment would go in the event of a conviction, and that the responsibility of the jury is to look carefully into his evidence to determine, among other things, whether you think that he is telling you the truth and if you are merely satisfied that he did tell you the truth, as he testified, then you would award his evidence the same degree of weight and attach to it the same belief that you would to the testimony of any disinterested witness who may have testified in the controversy.

Now, those are factors I am compelled in every case to advise the jury about, indicating just exactly the fairness that the law undertakes to make in any trial, only insisting that it wants to present the evidence in a court of law openly and then leave it to the jury, in the event a jury trial is in the situation, so that it can then determine from that and under oath to speak the truth, just what the truth is, and return a verdict in keeping therewith.

Now, the first step in this particular case is the bill of indictment and that I want to read to you and explain that to you before I go into the other factors because the case is not only one that is worthy of full consideration but the government insists it should be and, of course, the defendant obviously would require that it does and for that reason I want to give you just as explicit a charge as I can because of the crime and the effect it has.

The Grand Jury makes this charge:

That from on or about the 16th of September, 1969, and continuing until on or about the 7th day of November, 1969 — a period of about six weeks — at Charlotte, within the Western District of North Carolina, and at Wingate, within the Western District of North Carolina, Bobby Jerald Culpepper and Walter Jack Harwell, the defendants herein, did wilfully and unlawfully conspire, combine and agree together, and with other persons to the grand jury unknown, to commit an offense against the United States, to wit, to violate Section 2113(a), Title 18, United States Code, by entering and attempting to enter the State Bank of Wingate, Wingate, North Carolina, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to commit in that said bank a felony affecting that said bank, that is, the larcenous taking and carrying away from the vault of that said bank money belonging to and in the care, custody, control, management and possession of the bank, in violation of Title 18, United States Code, Section 317.

That, in itself, spelled out as it is, indicates and the government says and contends these two parties, one Walter Jack Harwell, who has not been apprehended, who the government says and contends fled the morning of November 7 and has not been picked up anywhere in the United States, and this defendant, Bobby Jerald Culpepper, who was finally arrested in such place as the evidence tends to show and brought here to trial; that they conspired and confederated together to commit a crime against the United States, that is, to rob the bank at Wingate, North Carolina, down in

Union County, a small town and a small bank, for the purpose of taking therefrom their property to which they were not entitled and which was owned and in the custody and control of the bank of Wingate and its officers and officials but which was federally insured. In the event it was taken by robbery or through some other loss, it would be covered by the federal insurance policy of coverage.

Then the bill of indictment goes on further:

The form and substance of the conspiracy was as follows: It was a part of the conspiracy that Bobby Jerald Culpepper — this defendant on trial — would secure the release of Walter Jack Harwell from custody of law enforcement officers in Charlotte, North Carolina; — and these are the steps that the government alleges it has shown you from the evidence and beyond a reasonable doubt — and that Bobby Jerald Culpepper would obtain drill and equipment necessary to cut through the wall of the vault of the State Bank of Wingate, Wingate, North Carolina; that the conspirators would break and enter that said bank and would cut through the wall of the vault and would take and carry away the money belonging to and in the care, custody and control of the bank resting in that vault. In furtherance of the aforesaid conspiracy and to accomplish the objects thereof the defendants, at the times and places hereinafter set forth, did commit the following overt acts:

And here the government undertakes to spell out in the bill the various steps that were taken in furtherance

in making preparation to rob the bank as alleged in the other paragraphs.

I That on or about October 2, 1969, at Charlotte, within the Western District of North Carolina, Bobby Jerald Culpepper, acting through an agency not a party to the conspiracy, did arrange for the release of Walter Jack Harwell from custody of authorities in Charlotte, North Carolina, by the posting of bail.

II On or about November 6, 1969, at Charlotte, within the Western District of North Carolina, Bobby Jerald Culpepper obtained a Black and Decker cordless electric drill from Little's Hardware, Charlotte, North Carolina, for use in furtherance of the objects of the conspiracy.

Thirdly, that on or about November 7, 1969, at Wingate within the Western District of North Carolina, Bobby Jerald Culpepper, Walter Jack Harwell and others to the grand jury unknown, did break and enter the State Bank of Wingate, Wingate, North Carolina, and did cut through a portion of the door of the vault of that said bank.

That's returned a true bill by the Foreman of the grand jury on the acts and deeds of the members of the grand jury. The government, therefore, says and contends that those are the immediate steps and those are the overt acts which would lead you to see clearly just exactly what the charge is leading to the conspiracy.

We then come down to the crime charged and I want to give you that just as clearly as I can. A conspiracy is defined as follows in Title 18, Section 371: If two or more persons conspire — and you will notice it's two or more; one person cannot conspire with himself because he would be only operating through his own mentality, two or more, the law says — conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

A conspiracy is best defined in this manner: A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal but by criminal or unlawful means.

Now that is the definitions I would give you with respect to what a conspiracy is, after reading to you what the law itself spells out as a conspiracy and such law being one among those enacted by the Congress of the United States.

So with those explanations, let's just pause for a moment, even though the case has been very ably argued both by counsel for the defendant and counsel for the government, and see what the government says and contends you should find from this evidence and beyond a reasonable doubt and, finding that, should re-

turn a verdict of guilty against the accused, being satisfied beyond a reasonable doubt.

The defendant, on the other hand, who is presumed to be innocent and against whom no burden of proof is cast, will likewise set out his contentions and indicates that the government failed to make out a case beyond a reasonable doubt and that thereupon he should be assured of his acquittal or release on a verdict of not guilty.

The government says and contends that this defendant, whose name is Bobby Culpepper as set out in this bill of indictment, which name was more or less finally determined some two years or shortly before as to what his true name was; that he came to Charlotte from Alabama where previously he had been charged with some offense and been placed on probation; that he came to Charlotte from Alabama by fleeing the jurisdiction where he was serving probation or serving under a term of probation and that when he came to Charlotte, North Carolina, that he changed his name from the genuine name given him at the time of his birth, Bobby Jerald Culpepper to Robert Lee O'Neill; and that shortly after he came here he went down — he lived in Charlotte, set up a residence in Charlotte, but went down to Wingate below Monroe in Union County, a relatively small place, and there he opened up a place of business or entered into a corporation under the name of Golden Contractors, Inc., and that, of course, obviously he, like all other people doing business, needed money and that he was able to, the government saying and contending, by one devious way or another to impress himself favorably upon the gen-

tleman who was operating that relatively small state bank and borrow some sums of money; that he began to work and hired some employees and, of course, money was one among the things that he needed; and finally when it appeared sometime in early September or therabouts or sometime in the fall of 1969 that the Federal Bureau of Investigation finally was able to find him in Charlotte, North Carolina, on a fugitive warrant issued to the FBI by the authorities in Alabama; that then he was arrested for leaving the jurisdiction in Alabama and placed up in the common jail of Mecklenburg County under the name of Bobby Lee O'Neill, as he was known by; that while he was in the jail he came in contact with and learned by being placed in a cell of one Walter Jack Harwell, the government saying and contending that Harwell never having been yet found, that he was a con man to the extent he was a check artist or one who knew how to drill holes in banks and how to rob banks and that while the two sat there during the days and nights that they came up with the idea that this bank down in Wingate, being relatively small and unguarded, having no photograph machines, having no system by which the outside public might be alerted, that that in the dead hours of the night would be a good bank to secure; that it was a bank that had a considerable amount of funds on hand and was somewhat removed and kept a good deal of cash on hand.

The government says and contends then that this defendant, by whatever name called, his right name or his assumed name, and Harwell discussed this matter and when this defendant was finally released from custody by posting some type of bond that was accep-

table to the authorities at that particular time, then he began to make an effort to get Harwell out of jail, the government saying and contending that Harwell had been a man that had previously had a good deal of experience in that and that right sizeable bonds were required; that his bond in this case was either seven or ten thousand dollars and that this defendant then, after his release from jail, that he went to see this bonding agency, whose agent came here on yesterday and testified, and made arrangements that he would give a bond so that Harwell could be released and that bond would cost 10%. If it was a $10,000 bond the cash to be paid to the bonding company would be $1000; if it was a $7000 bond, the cash would be $700; and that the check was issued by this defendant, which was deposited with the bonding company and that automatically on that same day Harwell was released from jail and that then they began to set in motion and carry further into the idea the question of getting the ingredients necessary that would permit them to make an effort to rob the bank by cutting into the vault in the nighttime; and the next day, the government says and contends, following the check which was deposited with the bond officials, that the next day, the, through some means or another, all of which the government says and contends it doesn't know, that a sufficiency of cash was gotten up, $700 or $1000, and taken to the bondsman who had already released Harwell and stood bail for him and the check was picked up; the government has offered you that check in evidence.

The government says and contends that then Harwell and the defendant began to set in motion the idea they had in mind and then it was on the day before

the bank actually was undertaken to be robbed that this defendant then issued a check for the cost of one Black and Decker drill and that then on that night he left his home and met with Harwell somewhere on the Union County Mecklenburg County line, or Cabarrus County line, as you will recall, sometime after midnight or just before and that then Harwell went down; that previously they had secured acetylene torches and oxygen and other circumstances, with bit drills to become effective and to go into the bank, both on the top where the cement was removed and the steel was out and in front around the combination of the bank.

The government says and contends that something happened. Either they ran out of sufficient supply of the necessary ingredients that made up the things they had there to use or that the drill was not sufficiently heavy enough to drill through the type of safe the money was put in; and that then, Hartwell, who was doing the work, he became frightened and he left and left everything there, taking nothing with him and among the things left there was the oxygen case and the other two cases, together with the Black & Decker tool and together with other things that indicated what had been used and thought to have been used; that the bank was broken into and that then the investigation began.

The government says and contends that then Harwell fled immediately and shortly after that, within a matter of a couple of weeks when it began to appear to the defendant that he likewise may be charged, that the investigation was being undergone by the FBI, that he left Charlotte and went to Key West, Florida, and then subsequently went to Mississippi and ultimately

and finally he was apprehended by some members of the Federal Bureau of Investigation; the government saying that when he first fled from Alabama he went to Alaska and there he remained for some time and subsequently came to Charlotte, North Carolina.

So the government says and contends that the evidence offered by the purchase of the Black & Decker tool, the evidence of the other things found there, the fact that the defendant and Harwell were together in jail, the fact that this defendant made it possible for Harwell to be released from custody so he might then perpetrate this crime and carry it into effect should show you from the evidence and beyond a reasonable doubt that the minds of these two men conspired and came together with an understanding and entered into a contract that they would rob this bank at Wingate, thinking it would be one that would likely have less protection than any other institution they had and such was the knowledge acquired by Culpepper through his association, his business in going to the bank every so often.

The government says and contends you should be satisfied beyond a reasonable doubt and being so satisfied you should return a verdict of guilty.

Now, there are two possible verdicts you can render in this case; one being, if the government satisfied you from the evidence and beyond a reasonable doubt as charged of the defendant's guilt, then your verdict would be guilty. If you are not so satisfied or have a reasonable doubt, your verdict would be not guilty. Those are the two verdicts that can be returned in this particular case.

The defendant, on the other hand, says and contends that you should have a reasonable doubt as to his guilt and, having such reasonable doubt, should return a verdict of not guilty.

He testified himself, which he has a right to do and you will accept his testimony with the requirements that I gave you. He offered the testimony of his wife and two ladies who were there at his house, friends of the family. He says and contends you should have a reasonable doubt.

He says and contends, to begin with, that he was in jail; that he did leave Alabama without the proper permission from the probation authorities and that he did go to Anchorage, Alaska, or someplace in Alaska, and remained up there some period of months but came down to Charlotte voluntarily, hoping he might enter into some sort of business through which he might provide adequately for himself and his wife and any others dependent upon him.

He says and contends that he did open up a legitimate business and that his headquarters were down at Wingate but that he lived in Charlotte and that he was undertaking to make an honest living.

He says and contends that he did when he was arrested for failing to stay in the jurisdiction or receive permission to leave the jurisdiction of the probation department in Alabama, and was placed in jail and that before he was able to give bond that he was with Harwell; that the two of them were in a cell together but that they never discussed anything in the world about

robbing a bank or having any controversy of that kind or discussion of that kind, one with the other; that their talking was such as it was and was purely and simply about other matters; and that he says and contends that he didn't bail Harwell out of jail but that Harwell got out under his own ability and put up the money to pay the bondsman for his being released from jail and that in no sense did he at any time advance any money or make himself liable for Harwell's bail.

He says and contends that he never saw Harwell after that; that the only time he ever saw him was there in jail or when he was released from bail; that he at no time would undertake to rob a bank where he was generally known and some evidences might point to his connection with the robbery and that on that day he only bought the tool and that was only more or less of a circumstance over which he had no control due to the fact that those working with him needed a tool of that kind and he told his wife to issue a check to take care of the Black & Decker tool and that he did purchase it but that it was not for the purpose of robbing a bank but for the purpose of using the tool to drill, to more or less make the indentions where they didn't have electric outlets to use the larger tools.

He says and contends that he stayed at home that night with his wife and other visitors there and you will remember all the evidence; that at no time did he leave except to get a pack of beer, several cartons of beer; that probably that night he got intoxicated to the extent that he couldn't have left because he was drunk; that he may have drunk some ten or a dozen cans of beer.

So he says and contends, among everything else, that he is just a victim of the placing together of certain factors that in themselves don't spell guilt in the sense that it could create some sort of a suspicion and that you should thereupon have a reasonable doubt of his guilt and, having such, should return a verdict of not guilty.

I have taken time to more or less elaborate on the contentions because I realize that you are trying a conspiracy. Ordinarily an offense is one that in itself makes the offense. A conspiracy is one where minds conspire together to do a sort of thing, whether it is successful or not, and it must be associated by at least two or more as all the authorities have universally held since criminal law of that type and character had begun.

So those are the contentions. Above all else, then, the government says and contends that your verdict should be guilty. The defendant, on whom no burden of proof rests and who is presumed to be innocent, says it should be one of not guilty. The question for you is just what you believe the truth is from this evidence you have heard. Ask yourself this question: Am I satisfied beyond a reasonable doubt of the guilt of the accused and beyond a reasonable doubt? If you are, then you would speak your verdict in answer to how you vote when the question comes up. If you are not so satisfied, you will likewise speak your verdict. If you are satisfied beyond a reasonable doubt, your verdict would be guilty. If you are not so satisfied, your verdict would be not guilty.

I charge you that this court has jurisdiction of this matter for that the evidence tends to show without contradiction that there was an outstanding insurance policy issued to this bank by the Federal Deposit Insurance Corporation, which in itself would insure the deposits of the bank if by some stealth or otherwise they were taken from the control and custody of the bank and for that reason, being insured by the Federal Government, operating under this federal insurance agency, the Federal Deposit Insurance Corporation, brings the jurisdiction to this court and the jurisdiction is proper.

Gentlemen, are there any other requests that either or both of you have with respect to this matter? Any requests for special instructions?

MR. SENTELLE: No requests from the United States Your Honor.

MR. GOODMAN: No requests from the defendant, Your Honor.

COURT: Ladies and gentlemen, having, as I believe, fully complied with those things that are cast upon me as judge presiding here at this term, I would suggest that when you retire that you go carefully into the matter, debate it fully, discuss it thoroughly; but first you would designate some member of your body as your Foreman. If you designate a lady, under her chairmanship, discuss the matter fully; if you designate a gentleman, under his chairmanship discuss the matter fully; and then after you have discussed it fully then take a vote and if twelve of your minds come to-

gether, if all of you agree on the same thing at the same time in the same way, you have reached a verdict. Dependent on the way and manner in which that verdict is reached, you would return to this courtroom and in your presence and the presence of the court and through the voice of your Foreman, speak the verdict as you will be asked to do by the Clerk when you return.

You may retire. If you all want the bill, I'll be glad to present it to you.

WHEREUPON, the jury retired at 11:00 A.M.

WHEREUPON, the jury returns into the courtroom at 12:40.

COURT: Let the record appear that the defendant and his counsel and the District Attorney are present in the court when the jury returns. At this time the Court asks the jury if they have reached a verdict.

FOREMAN: Yes, sir.

CLERK: Have you selected a Foreman?

FOREMAN: Yes.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1735

United States of America,

Appellee,

versus

Bobby Jerald Culpepper,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.

Upon consideration of the petition for rehearing in the above entitled case,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, denied.

FOR THE COURT:

/s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

FILED
January 30, 1973

WILLIAM K. SLATE, II
CLERK

A True Copy, Teste:

(SEAL)

William K. Slate, II, Clerk
By /s/ Virginia Lipford
Deputy Clerk